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Torts—Recovery for Intentional Infliction of Emotional Injury

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done,²⁴ and this indifference to consequences is the same thing as a species of "wanton or reckless conduct."²⁵

Where is the line to be drawn? Is inadvertence enough to amount to "gross negligence"? If so, why is it any different from simple negligence? If not, why is it any different from "wanton misconduct," which takes into consideration states of mind? When is conduct serious enough to be "gross" but not serious enough to be in "utter disregard"? What are the tests, the factors and the language which will guide the court in making a delineation, no matter how imprecise, between "absence of slight care" and "failure to use reasonable care under the circumstances?" Most important, how can a jury give a verdict which accurately reflects the court's language and do it with some consistency? Is it not impossible unless we move up the scale to the point at which the defendant has become conscious of the danger and elects to encounter it, or at least becomes indifferent to it?

The continued and puzzling inclination of legislatures to use "gross negligence" as a standard of care in host-guest statutes presents any court with an obvious challenge. By defining "gross negligence" simply as "absence of slight care" the Washington court has taken the easy way out. The expectable result of this decision is more work for the court, as both juries and trial judges struggle to find meaning in a phrase than has no meaning.

DWAYNE COPPLE

Recovery for Intentional Infliction of Emotional Injury. Until recently, a plaintiff who had suffered emotional injury normally had to show an accompanying physical harm in order to maintain a successful action for damages. His ability to recover for severe emotional distress unaccompanied by physical injury is being recognized by an increasing number of jurisdictions. The current situation is marked by the unsettled nature of the law. Reluctance to grant relief for such an injury has been based upon a desire to avoid not only fictitious claims, but also the litigation of trivialities and bad manners. However, even before this change in attitude by the courts, if some independent tort, such as assault, battery, or false imprisonment could be made out, that cause of action served as a peg upon which to hang the recovery for emotional injury, and recovery was freely permitted. In recent years the courts have tended to recognize the intentional

²⁴ *Williamson v. McKenna*, 223 Or. 366, 354 P.2d 56 (1960); Note, 35 MICH. L. REV. 804 (1937).

²⁵ RESTATEMENT, TORTS § 500 (1934).

infliction of mental or emotional disturbance as a separate tort.¹ In keeping with this trend, the Restatement of Torts has given recognition to liability for such an injury by revising the position stated in the original section 46.² In his analysis of the present situation, Professor Prosser writes:

It has gradually become recognized that there is no magic inherent in the name given to a tort, or in any arbitrary classification and that the infliction of mental injury may be a cause of action in itself. Its limits are as yet ill defined, but it has been extended to its greatest length in the case of intentional acts of a flagrant character, whose enormity adds special weight to the plaintiff's claim, and is in itself an important guarantee that the mental disturbance which follows is serious and not feigned.³

A study of Washington case law in the area of emotional injury intentionally inflicted reveals three separate phases of development. The first phase is characterized by decisions rendered before 1925 where emotional injury was considered along with some "physical" violence. The second phase contains those cases decided between 1925 and 1960 where the court allowed recovery for emotional injury from "wrongful" conduct without any physical violence. The third phase is characterized by the present position taken in 1962 by the Washington Supreme Court in *Christensen v. Swedish Hospital*,⁴ where

¹ PROSSER, TORTS § 11 (2d ed. 1955). For a comprehensive list of text authority dealing with the development of the law in this area see generally *id.* § 11 n.9; HARPER & JAMES, TORTS §§ 9.1-9.7 (1956). This note is devoted to the area of tort law involving the "intentional infliction" of such harm and will not specifically deal with emotional injury caused by negligence. Recovery for emotional distress due to negligent conduct is in itself a subject that has many more problems than the area of tort law covered by this note. To be sure, many problems are common to both areas but it is generally agreed that recovery for intentional conduct injurious to another is more readily given by the courts than recovery for negligent conduct. The reason for this attitude lies in the fact that an intentional act is more likely to produce the result desired and there is less chance that such a result (emotional distress) will be feigned by the injured party.

² RESTATEMENT, TORTS § 46 (1934): "Conduct which is intended or which though not so intended is likely to cause only a mental or emotional disturbance to another does not subject the actor to liability (a) for emotional distress resulting therefrom, or (b) for bodily harm unexpectedly resulting from such disturbance." Compare RESTATEMENT, TORTS § 46 (Supp. 1948): "One who, without a privilege to do so, intentionally causes severe emotional distress to another is liable (a) for such emotional distress, and (b) for bodily harm resulting from it." For the reasoning behind this changed position comment d. states: "The interest in freedom from severe emotional distress is regarded as of sufficient importance to require others to refrain from conduct intended to invade it."

³ PROSSER, TORTS § 11 at p. 40 (2d ed. 1955). See *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal.2d 330, 240 P.2d 282 (1952) (following the change in the RESTATEMENT). See Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939).

⁴ 59 Wn.2d 545, 368 P.2d 897 (1962).

the court indicates that bad motive, intended solely to cause emotional injury, is actionable.

Prior to 1925, the Washington court showed a willingness to allow recovery for emotional or mental injury but only if the defendant's wrongful conduct also violated some other right of the plaintiff. The following cases illustrate this proposition: Plaintiff, a young girl of 21, paid for a railroad ticket for passage from Chicago to Seattle, but by mistake received a ticket good only as far as Missoula, Montana. Damages were allowed for her expulsion at Missoula, although unaccompanied by physical force or violence, on the theory that when the relation of passenger and carrier is established, a wrongful violation of the contract upon the part of the carrier is a breach of a public duty.⁵ Injuries sustained by a plaintiff when her buggy was upset because of defendant's improper construction of a street railway included personal disfigurement. In awarding compensation for mental suffering, the court stated that emotional injuries are inseparable from physical.⁶ Another case involved the defendant's willful expulsion of plaintiff from a public park where she had a right to be, because defendant mistook her for an "undesirable character." Here the court based its decision on a finding of duress.⁷ Relief was granted for mental suffering resulting from libelous words which were actionable per se (they tended to degrade and work financial loss to the plaintiff).⁸ An elderly woman sued her landlord when he tried to evict her before her lease had expired. Though no physical injury was inflicted, the wrongful entry was held to be a physical invasion of plaintiff's personal rights.⁹ In a similar case the court refused recovery for mental suffering where defendant's acts did not constitute a physical invasion amounting to an assault.¹⁰ In allowing recovery to a Negro who was refused admittance to defendant's theatre after he had purchased a ticket,¹¹ the court based its judgment on a finding of a technical

⁵ *Willson v. Northern Pac. R. Co.*, 5 Wash. 621, 32 Pac. 468, 34 Pac. 146 (1893).

⁶ *Gray v. Washington Water Power Co.*, 30 Wash. 665, 71 Pac. 206 (1903). This case illustrates the court's early position as to recovery for emotional distress connected to physical harm caused by negligence.

⁷ *Davis v. Tacoma R.R. & Power Co.*, 35 Wash. 203, 77 Pac. 209 (1904), 30 WASH. L. REV. 46 (1955).

⁸ *Ott v. Press Publishing Co.*, 40 Wash. 308, 82 Pac. 403 (1905), 30 WASH. L. REV. 41 (1955).

⁹ *Nordgren v. Lawrence*, 74 Wash. 305, 133 Pac. 436 (1913), 5 WASH. L. REV. 36 (1930).

¹⁰ *Barnes v. Bickle*, 111 Wash. 133, 189 Pac. 998 (1920), 5 WASH. L. REV. 36 (1930).

¹¹ *Anderson v. Pantages Theatre Co.*, 114 Wash. 24, 194 Pac. 813 (1921).

assault.¹² In a case involving the improper burial of an infant child, the parents were allowed to recover for emotional suffering unaccompanied by physical injury.¹³ At the time this decision was rendered, the court itself recognized this to be an extreme application of the rules of law allowing damages for mental suffering alone. Here too, however, the acts of the defendant, although regarded by the court as willful, were held wrongful because they violated the right of the parents to have a decent interment for their infant child.

In 1925, the Washington court in *Gadbury v. Bleitz* rendered an opinion which appeared to recognize emotional distress, unaccompanied by physical violence, as a separate tort upon which relief would be granted if it could be shown that the defendant's conduct amounted to a "willful wrong."¹⁴ The defendant, who was an undertaker, withheld the corpse of plaintiff's son from burial for the purpose of enforcing payment of a previous indebtedness due from a third person. In holding this type of conduct to be a "willful wrong," the court stated:

It is unnecessary to state all the reasons for the rule, or to attempt to draw a distinction between the many cases cited in the briefs, for an examination of them will show that in nearly every one where recovery was denied it has been upon the ground that the act of the defendant was simply negligent, and was not an act done with the *willful intent to cause the plaintiff to suffer*. (Emphasis added.)¹⁵

However, in the same paragraph, the court went on to say:

It requires no argument to demonstrate that, under the evidence, the failure to cremate the body was not a mere delay caused by negligence. The testimony shows that the body was kept long after the time agreed upon for its cremation, and it is apparent that it was held for the express purpose of compelling payment of the Shifty bill. *This was a willful wrong*. (Emphasis added.)¹⁶

¹² *Id.* at 31, 194 Pac. 813 at 816 (1921). The court here said: "The act alleged in itself carries with it the elements of an assault upon the person, and in such cases the personal indignity inflicted, the feeling of humiliation and disgrace engendered, and the consequent mental suffering, are elements of actual damages for which a compensatory award may be made."

¹³ *Wright v. Beardsley*, 46 Wash. 16, 89 Pac. 172 (1907), 5 WASH. L. REV. 36 (1930), 34 WASH. L. REV. 189, 191 (1959).

¹⁴ *Gadbury v. Bleitz*, 133 Wash. 134, 233 Pac. 299 (1925), 5 WASH. L. REV. 36 (1930). There is a definite trend toward the recognition of a right to recover for a severe disturbance of mental or emotional tranquillity resulting from an unprivileged act of defendant reasonably calculated to cause severe emotional distress to plaintiff and committed intentionally or recklessly—regardless of the existence of any physical impact. For a careful analysis of the situation and a presentation of case law recognizing such a right to recovery, see Annot., 64 A.L.R.2d 100, 119 (1959).

¹⁵ *Gadbury v. Bleitz*, 133 Wash. 134, 137, 233 Pac. 299, 300 (1925).

¹⁶ *Ibid.*

Was the "willful wrong" committed in this case conduct motivated by a desire on defendant's part to cause plaintiff to suffer mental distress or was it the refusal to bury the corpse until the indebtedness was paid by plaintiff? The court failed to give any clear answer to this question. However, in light of this question, it is interesting to note that the court did refer to a Washington statute which made the detention of a dead body of a human being punishable as a misdemeanor.¹⁷ The court also recognized that plaintiff's right to maintain this action rested on an interest given to deceased's relations in seeing that the last rites were properly administered.¹⁸ In a 1929 case the court did not allow recovery for mental distress unaccompanied by physical violence where plaintiff was excluded from participating in the finals of a moving picture contest and the chance to win an advertised free trip to Hollywood. The court did, however, imply that if defendant's conduct had been willful in the sense of being malicious, recovery might have been granted. The facts failed to support such a finding and the court never did establish whether intentional conduct motivated by maliciousness with the sole purpose of causing emotional distress constituted a "willful wrong."¹⁹ In the more recent case of *Browning v. Slenderella Systems*,²⁰ the Washington court allowed recovery for a wrongful act intentionally done and resulting in mental or emotional distress. However, in this case the court held that the wrongful act or "willful wrong" causing the injury was an act of racial discrimination and not defendant's desire to cause plaintiff to suffer emotional distress.²¹

In *Christensen v. Swedish Hospital*, decided in 1962, the Washington Supreme Court rendered an opinion giving recognition as a separate tort to the intentional infliction of severe emotional distress when such

¹⁷ RCW 68.08.120.

¹⁸ See note 14 *supra*.

¹⁹ *Stiles v. Pantages Theatre*, 152 Wash. 626, 279 Pac. 112 (1929). Cf. *Lewis v. Physicians and Dentists Credit Bureau, Inc.*, 27 Wn.2d 267, 272, 177 P.2d 896, 899 (1947) where the Washington court refers to *Stiles'* language as a mere "implication."

²⁰ 54 Wn.2d 440, 341 P.2d 859 (1959), 35 WASH. L. REV. 245 (1960).

²¹ *Id.* at 446, 341 P.2d at 863. In this case, the Washington Supreme Court adopted the language of the RESTATEMENT, TORTS § 46 (Supp. 1948). Before recovery would be granted, the injured party had to prove that she suffered "severe emotional distress." As a guide to measure the defendant's conduct the court quoted RESTATEMENT, TORTS § 46 comments g, h, and i (Supp. 1948). They found that actionable conduct had to be of such a nature that "[R]ecitation of the facts to an average member of the community would arouse his resentment against the actor and lead him to exclaim 'outrageous.'" *Id.* at 448, 341 P.2d at 864. It is interesting to note that as in *Gadbury v. Bleitz*, defendant's wrongful conduct was also here in violation of a statute known as the "public accommodation" statute. (RCW 9.91.010(2)). *Id.* at 444, 341 P.2d at 862.

conduct has been motivated by a sense of maliciousness *solely* intended to cause such injury in order to obtain payment of a bill.²² The plaintiff stopped payment on a check given defendant for services rendered on the contention that such services and care were improperly and negligently administered. In a letter to the plaintiff, defendant's business manager requested payment within ten days stating that an investigation of plaintiff's case could not uncover any facts to support his claim of negligence. It was further stated that failure to pay the debt would result in the matter of the stoppage being referred to the prosecuting attorney. Plaintiff commenced an action against the defendant asserting two claims, the second of which claimed damages for severe emotional distress caused by the defendant's letter.²³ The lower court dismissed this second claim and the plaintiffs appealed. In holding that the amended complaint did in fact allege a claim upon which relief could be granted, the Washington Supreme Court reasoned as follows:

A tort is a legal wrong and, if foreseeable injury results from the unlawful act, the tortfeasor is liable in damages to the party injured. Two essential elements are involved: (1) a legal wrong, and (2) damages foreseeably resulting therefrom. The injury in the instant case was alleged to be great mental anguish and severe emotional distress. Such injuries are compensable if the proof establishes that they were caused by the legal wrong. (Citations omitted.)²⁴

The court next discussed what it conceived to be the legal wrong here alleged:

In the instant case, the appellants, if acting in good faith, had a right to

²² 59 Wn.2d 545, 368 P.2d 897 (1962). For additional recent cases supporting the recovery for intentionally inflicted emotional distress where it was found that defendant's motive was malicious and solely intended so to injure the plaintiff, see *Norris v. Moskin, Stores Inc.*, 272 Ala. 174, 132 So. 2d 321 (1961); *Knierdin v. Izzo*, 22 Ill.2d 73, 174 N.E.2d 157 (1961); *Curnett v. Wolf*, 244 Iowa 683, 57 N.W.2d 915 (1953); *Barnett v. Collection Service Co.*, 214 Iowa 1303, 242 N.W. 25 (1932); *Quina v. Roberts, La. App.*, 16 So. 2d 558 (1944); *Biederman's of Springfield, Inc. v. Wright, Mo. App.*, 322 S.W.2d 892 (1959); *La Salle Extension University v. Fogarty*, 126 Neb. 457, 253 N.W. 424 (1934); *Housh v. Peth*, 99 Ohio App. 485, 135 N.E.2d 440 (1955); *Harned v. E-Z Finance Co.*, 151 Tex. 641, 254 S.W.2d 81 (1953).

²³ The complaint asserting the second claim for relief reads in part: "[T]he defendant *wilfully, maliciously and intentionally threatened* plaintiffs with criminal prosecution for stopping payment on the above mentioned check; . . . that said threat was made with full knowledge of the age and extreme poor physical condition of both plaintiffs and with a complete disregard and indifference as to the consequences of such threat; that the threat of criminal prosecution has caused both plaintiffs great mental anguish, severe emotional distress and fear for their personal liberty." *Christensen v. Swedish Hospital*, 59 Wn.2d 545, 368 P.2d 897, 898 (1962).

²⁴ *Christensen v. Swedish Hospital*, 59 Wn.2d 545, 548, 368 P.2d 897, 899 (1962). It should be pointed out that the Washington Supreme Court only decided that the trial court erred in dismissing the second cause of action.

stop payment on the check. Likewise, the respondent, if it believed in good faith that the stoppage of payment on the check was conceived in fraud, had a right to submit the circumstances to the prosecuting attorney. Neither of these acts was, in itself, illegal or tortious.

The allegations of appellants' amended complaint require that they establish that their conduct in stopping payment on the check was exercised in good faith, and that the threat by respondent to refer the circumstances of the matter to the prosecuting attorney was willfully and maliciously stated, with the sole intent to injure the appellants.²⁵

To what extent does the decision in *Christensen* differ from the opinion rendered in *Gadbury* in 1925? In both cases the court indicated its disapproval of extra-legal methods used to collect an unpaid debt. In *Gadbury* the court found that the *act* of withholding a body from burial for the purpose of collecting a previous debt was "wrongful."²⁶ In essence the court there was saying that defendant's actions were outrageous and contrary to public standards of acceptable conduct, therefore amounting to a "legal wrong." (This is indicated by the statute making such conduct a misdemeanor.)²⁷ The defendant failed to use those legal procedures available to him for the collection of such debts. In *Christensen*, it again appears that the court did not approve of defendant's method for collecting unpaid bills. However, the court admitted that defendant's conduct, if performed in good faith, was not in itself wrongful or tortious.²⁸ What the court distinguished as "wrongful" in this case was the *motive* behind such conduct. The court here implied that the purpose to collect the debt may have been supplanted by a malicious purpose to cause severe emotional distress. Consequently, if the *sole* purpose or motive behind defendant's actions was to cause severe emotional distress, that conduct was a "willful wrong." The word "willful" as used by the court connotes something more than "intentional." Intentional conduct resulting in an emotional injury in itself is not necessarily wrongful.²⁹ It is when that conduct or the

²⁵ *Id.* at 549, 368 P.2d at 899.

²⁶ *Cf.* *Bowden v. Spiegle, Inc.*, 96 Cal.App.2d 793, 216 P.2d 571 (1950).

²⁷ See note 17 *supra*.

²⁸ *Christensen v. Swedish Hospital*, 59 Wn.2d 545, 549, 368 P.2d 897, 899 (1962).

²⁹ It is unfortunate that courts often find it necessary to use ambiguous words such as "willful." If taken in its literal sense, the word "willful" means or is defined as "intentional." In other words, "willful conduct" normally means "intentional conduct." However, when used by the court the word "willful" often takes on a much more descriptive meaning, *i.e.*, it is used to indicate either the harsh nature of an intentional act or an undesirable motive or purpose behind an intentional act. Willful conduct, in the sense of being intentional, is not always wrongful. Therefore, it is necessary to remember when reading an opinion in which recovery for a "willful wrong" has been granted that the court is actually giving redress not simply because the injurious act was intentional, but because the nature of the act or the motive behind it is contrary to public policy and accepted standards of conduct.

motive behind that conduct exceeds the limits or social standards of acceptability that the court will find a "willful wrong." "Willful," then, is used to describe conduct or motive which is permeated with a sense of maliciousness, recklessness or wantonness—that which the actor knows or should know is unacceptable.

In allowing recovery for the intentional infliction of emotional injury, Washington case authority appears to be in full accord with the present trend of American jurisdictions.³⁰ Apparently Washington now has two causes of action in tort for an intentional infliction of emotional injury unaccompanied by any physical violence. One action is based upon the outrageous nature of the *act* producing only an emotional disturbance. The other is based upon the nature of the actor's *motive* or purpose in the performance of an intentional act. A malicious motive solely intended to cause severe emotional distress may result in conduct which exceeds the bounds of reasonableness. Yet, as indicated in the comparison between the *Gadbury* and *Christensen* cases, this is not always the case. Therefore, it is submitted that recognition of "wrongful" motive as well as outrageous conduct as separate causes of action gives the injured party a broader remedy for the intentional infliction of emotional distress.

GUST S. DOCES

Intersection Collisions—Deception. The invitation to litigation issued by the Washington court when it decided *Martin v. Hadenfeldt*¹ in 1930 was again accepted by counsel in *Chavers v. Ohad*.²

David Ohad was driving his father's car along an arterial in Yakima about 2:00 in the morning. Mrs. Chavers stopped before entering the arterial, looked up the street and saw David about one block away, thought that she could pull out and make a left turn onto the arterial, and began doing so. The two cars collided in the intersection.

Mrs. Chavers recovered a judgment based on a verdict in her favor in the Superior court of Yakima county, but that judgment was reversed by the Washington Supreme Court. Judge Weaver noted that the case was controlled by a Yakima right-of-way ordinance,³ and

³⁰ See note 1 *supra* and the discussion in note 14 *supra*.

¹ 157 Wash. 563, 289 Pac. 533 (1930). For an extensive discussion of the case, see Comment, 26 WASH. L. REV. 30 (1951).

² 59 Wn.2d 646, 369 P.2d 831 (1962).

³ The ordinance is substantially the same as RCW 46.60.170. ("The operator of a vehicle entering upon an arterial highway, road, street, alley, way or driveway, shall come to a complete stop at the entrance of such arterial highway, and having stopped